IN THE COURT OF APPEALS OF IOWA

No. 3-1034 / 12-1065
Filed January 9, 2014

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JABARI LAMAR WALKER,
Defendant-Appellant.

STATE OF IOWA,
Plaintiff,

vs.

IOWA DISTRICT COURT FOR LINN COUNTY,
Defendant.

Appeal from the Iowa District Court for Linn County, Nancy A. Baumgartner, Judge.

Jabari Walker appeals from the judgment and sentence entered upon his conviction for kidnapping in the third degree; the State cross-appeals the sentence entered following Walker's conviction. **CONVICTION AFFIRMED ON APPEAL; SENTENCE VACATED AND REMANDED ON CROSS-APPEAL.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Jerry Vander Sanden, County Attorney, and Anthony Leon, Student Legal Intern, for appellee.

Heard by Doyle, P.J., and Tabor and Bower, JJ.

DOYLE, P.J.

In this consolidated appeal and certiorari action, defendant Jabari Walker appeals his conviction for third-degree kidnapping, contending his trial counsel was ineffective in failing to assert the jury's verdict was contrary to the weight of the evidence in his motion for a new trial. Because we conclude Walker has failed to prove this claim, we affirm his conviction. In its certiorari action, the State challenges the district court's decision finding that Walker was not subject to enhanced sentencing under Iowa Code section 901A.2 (2011). Because Walker's sentence qualifies as a sexually predatory offense under section 901A.1, we sustain the writ of certiorari, vacate Walker's sentence, and remand the case for resentencing.

I. Background Facts and Proceedings

From the evidence presented at trial, the jury could have deduced the following. At around 1:00 a.m. on May 7, 2011, Lisa Nguyen went to a bar in Iowa City to celebrate a friend's birthday. Before Nguyen found her friends, Jabari Walker approached her and asked her how many people she was with. When Nguyen said she was alone, Walker asked if she wanted to "hang out with him." Nguyen left the bar with Walker.

Nguyen was uncomfortable getting in Walker's car when she learned he had two male friends with him. Walker gave Nguyen a ride to her car a few blocks away, and Nguyen led Walker to a nearby motel in Coralville, where Walker was taking his two friends. Nguyen waited while Walker paid for a room for his friends and dropped them off. Walker then asked Nguyen to go out to eat with him. Nguyen agreed and got into Walker's car.

Instead of driving toward the local restaurants, Walker got on Interstate 80 and headed toward Cedar Rapids. Nguyen got scared and asked Walker to stop the car. Walker locked the doors. As he drove, Walker forced Nguyen to perform oral sex. Nguyen, fearing for her life, told Walker she needed to use the bathroom and asked him to stop. Walker refused, and he drove past rest areas, open convenience stores, and the exit leading to his apartment before he exited Interstate 380 north of Cedar Rapids, more than thirty miles from the motel in Coralville.

After exiting, Walker drove five miles into rural Linn County before he parked his car behind a barn at an abandoned farm. He then walked to the passenger side of the car and opened the door. He again demanded that Nguyen perform oral sex.

Linn County Deputy Sheriff Daniel Williams was patrolling rural Linn County that morning. At approximately 2:30 a.m., Deputy Williams drove by the abandoned farm and noticed Walker's car parked with its headlights turned off. Deputy Williams pulled into the abandoned farm's driveway and activated his spotlight. He observed Nguyen sitting in the passenger seat with the door open and Walker standing in the open door. Nguyen immediately jumped up and ran toward Deputy Williams "screaming" and "yelling" that Walker "was going to kill her." Deputy Williams observed that the "look on [Nguyen's] face was basically sheer terror." Walker ran after Nguyen, appearing as though he was "trying to zip his pants up." He yelled "several times" for Nguyen to tell Deputy Williams "she was his girlfriend." Nguyen, in turn, said she "didn't know who he was and she wasn't his girlfriend." Sensing the seriousness of the situation, Deputy

Williams activated his patrol car microphone and was able to record most of the interaction.

Nguyen was transported to St. Luke's Hospital where she underwent a thorough sexual assault examination. Nguyen was at the hospital for over five hours. During that time, Nguyen provided an account of the incident consistent with her prior statements to the officers. Oral swabs taken from Nguyen were analyzed by the Iowa Department of Criminal Investigation. Nguyen's DNA was found on the penile swabs taken from Walker.

The State charged Walker with kidnapping in the first degree, and the case proceeded to trial. In addition to other evidence, the State presented testimony from Nguyen, the sexual assault nurse that examined Nguyen, Deputy Williams, and several other Linn County officers.

Walker testified in his defense. According to Walker, Nguyen had performed consensual oral sex in his car after they left the bar together in Iowa City. Nguyen then agreed to go to his apartment in Cedar Rapids to continue the activity in a more private setting. They dropped off Walker's friends at a motel, but, en route to Walker's apartment, Nguyen grew uncomfortable and asked Walker to take her to her friend's house in Cedar Falls instead. Walker, who had only recently moved to Iowa, believed Cedar Falls was a suburb of Cedar Rapids. Their conversation grew "argumentative" when he realized how long it would take to get to Cedar Falls. Nguyen then "jumped to a different topic" and stated she had to use the bathroom. By that time, Walker had already passed the exit for his apartment, so he pulled onto the next exit and drove to an

abandoned farm for Nguyen to go to the bathroom, at which point they were discovered by Deputy Williams.

Following trial, the jury found Walker guilty of the lesser-included offense of kidnapping in the third degree. The district court denied Walker's motion for a new trial. The court also denied the State's request for enhanced sentencing for Walker's alleged sexually predatory offenses. The court entered judgment and sentenced Walker to a term of incarceration not to exceed ten years.

Walker appealed his conviction, and the State filed a petition for writ of certiorari challenging the sentence imposed by the district court. The Iowa Supreme Court granted the State's petition for writ of certiorari, consolidated the State's certiorari action with Walker's appeal, and directed the parties to "proceed as though it were a cross-appeal." We review this case accordingly. Additional facts will be set forth below as necessary.

II. Walker's Appeal

Walker contends his trial counsel was ineffective in failing to claim the jury's verdict was contrary to the weight of the evidence in his motion for new trial. We review ineffective-assistance-of-counsel claims de novo. *State v. Finney*, 834 N.W.2d 46, 49 (Iowa 2013). "Although we normally preserve ineffective-assistance claims for postconviction-relief actions, we will address such claims on direct appeal when the record is sufficient to permit a ruling." *Id.* (internal quotation marks omitted). Neither party urges us to preserve the claim, and we find the record is sufficient to allow us to address it.

To prevail on his claim, Walker must show that (1) counsel breached an essential duty and (2) prejudice resulted. *See Strickland v. Washington*, 466

U.S. 668, 687 (1984). We presume counsel rendered competent representation, and Walker bears the burden to prove otherwise. *See Millam v. State*, 745 N.W.2d 719, 721 (Iowa 2008). Additionally, "counsel has no duty to raise an issue that has no merit." *State v. Dudley*, 766 N.W.2d 606, 620 (Iowa 2009). To establish the prejudice prong, Walker must demonstrate "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *See Anfinson v. State*, 758 N.W.2d 496, 499 (Iowa 2008). If either element is lacking, Walker's claim fails. *See id.*

Walker claims his counsel should have urged in his motion for new trial that the jury's verdict was contrary to the weight of the evidence, which refers to a determination by the factfinder "that a greater amount of credible evidence supports one side of an issue or cause than the other."[1] *See State v*. *Ellis*, 578 N.W.2d 655, 658-59 (Iowa 1998) (noting the court is to consider whether a verdict is contrary to the weight of the evidence in reviewing a motion for new trial). Because, as Walker's argument goes, "Nguyen's testimony failed the weight of the evidence test" and his own "testimony was far more consistent and believable," his counsel was ineffective in failing to challenge the weight of the evidence. We disagree.

Aside from an arms-length comparison of the contradictory testimony of Nguyen and Walker, Walker proffers little support for his claim. This is essentially a he-said-she-said case, and the jury was "free to reject certain evidence and credit other evidence." *State v. Nitcher*, 720 N.W.2d 547, 556

[1] To be clear, Walker does not allege the district court used an incorrect standard in ruling on his motion.

(Iowa 2006). It is apparent from the jury's verdict it found Nguyen's testimony to be credible, and the jury was free to disbelieve Walker's story and find his explanations of the incident to be unconvincing and inconsistent.

Here, Nguyen's testimony, in and of itself, is sufficient to support the jury's verdict. *See State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995) ("The only direct evidence is the complainant's testimony. But under today's law that is sufficient to convict."); *see also* Iowa R. Crim. P. 2.21(3) ("Corroboration of the testimony of victims shall not be required."). As the district court observed in its ruling denying Walker's motion for new trial:

> [Walker] testified that he and Nguyen had consensual oral sex in his car before they left for [the motel] to drop off his friends, and it was the only sex act that occurred. He further testified that Nguyen voluntarily agreed to go to his house in Cedar Rapids, but she changed her mind sometime while they were driving north on Interstate 380 and that he refused to drive her home. . . . Nguyen testified that she consented to going out to eat with him, but she did not consent to going to his home and that the multiple acts of oral sex were not consensual. The jury could have found that at some point as they were driving north on I-380 that Walker's intent changed and that he then confined or removed Nguyen with the intent to sexually abuse her.

Furthermore, in addition to the testimony of Nguyen, the jury also heard the testimony of Deputy Williams as to his observations of the scene. Deputy Williams testified Nguyen ran toward him screaming with a look of "sheer terror," yelling Williams was going to kill her. The jury also heard the patrol car audio recording, which revealed Nguyen's frantic, emotional pleas for help. The jury heard the testimony of the sexual assault nurse who examined Nguyen, to whom Nguyen relayed a consistent account of the incident as she had previously

expressed to the officers. This additional evidence corroborated Nguyen's story and increased its reliability.

Under these facts, the record simply does not support Walker's claim that the evidence preponderates heavily against the verdict. *See Ellis*, 578 N.W.2d at 659 (cautioning trial courts to exercise discretion "carefully and sparingly when deciding motions for new trial based on the ground that the verdict of conviction is contrary to the weight of the evidence" and observing "the power to grant a new trial on this ground should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict"). From our review of the evidence, we find a greater weight of the evidence supports the jury's verdict, and as a result, there is no reasonable probability the district court would have granted a new trial on this ground had Walker's attorney raised it. Because Walker cannot establish he was prejudiced by any breach of his trial counsel's duty, his ineffective-assistance claim must fail on this ground.

III. State's Cross-Appeal

The State's cross-appeal presents the question of whether Walker's conviction of kidnapping in the third degree, a class "C" felony, constituted a "sexually predatory offense" under chapter 901A that could subject him to an enhanced sentence. The State contends the district court erred in failing to find Walker's conviction in this case qualified as a sexually predatory offense, which led to the court's failure to impose a chapter-901A-enhanced sentence. The State asserts this error has resulted in an illegal sentence.

We review of challenges to the legality of a sentence for correction of errors at law. *See State v. Carstens*, 594 N.W.2d 436, 437 (Iowa 1999). "We may correct an illegal sentence at any time." *Id.*

Section 901A.2(3) provides:

> [A] person convicted of a sexually predatory offense which is a felony, who has a prior conviction for a sexually predatory offense, shall be sentenced to and shall serve twice the maximum period of incarceration for the offense, or twenty-five years, whichever is greater, notwithstanding any other provision of the Code to the contrary. A person sentenced under this subsection shall not have the person's sentence reduced under chapter 903A or otherwise by more than fifteen percent.

The term "sexually predatory offense" includes "any serious or aggravated misdemeanor or felony which constitutes . . . [a]ny offense involving an attempt to commit an offense [of sexual abuse as set forth in chapter 709]."[2] *See* Iowa Code § 901A.1(1)(a), (e).

Here, the jury was instructed the State would have to prove all the following elements of kidnapping in the third degree:

> 1. On or about the 7th day of May, 2011, Jabari Walker:
> a. confined Lisa Nguyen OR
> b. removed Lisa Nguyen from one place to another

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[2] Specifically, section 901A.1(1) provides:

> As used in this chapter, the term "sexually predatory offense" means any serious or aggravated misdemeanor or felony which constitutes:
> a. A violation of any provision of chapter 709.
> b. Sexual exploitation of a minor in violation of section 728.12[(1)].
> c. Enticing a minor in violation of section 710.10[(1)].
> d. Pandering involving a minor in violation of section 725.3[(2)].
> e. *Any offense involving an attempt to commit an offense contained in this section*.
> f. An offense under prior law of this state or an offense committed in another jurisdiction which would constitute an equivalent offense under paragraphs "a" through "e".

(Emphasis added.)

> 2. Jabari Walker knew he did not have the consent of the victim to do so.
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> 3. Jabari Walker did so *with the specific intent to subject Lisa Nguyen to sexual abuse*, as defined in Instruction No. 21.[3]

(Emphasis added.) The jury ultimately found Walker guilty of this offense.

The State requested enhancement of Walker's sentence under chapter 901A, claiming Walker's conviction constituted a sexually predatory offense.[4] Walker resisted the enhancement. The parties briefed the issue, and a hearing was held. The district court determined Walker's conviction did not qualify as a sexually predatory offense under section 901A.1, concluding "intent to commit sexual abuse is not synonymous with an attempt."

The parties appear to agree that intent is not synonymous with an attempt. Indeed, in proving attempt, the State must show both the defendant's "intent to do an act or bring about certain consequences which would in law amount to a crime" *and* "an act in furtherance of that intent." *State v*. *Spies*, 672 N.W.2d 792, 797 (Iowa 2003) (quoting 4 Robert R. Rigg, *Iowa Practice*, *Criminal Law* § 10.3, at 232 (2003)).

The State claims, however, that the jury's verdict indicated it found more here than just Walker's intent; *i.e*., by finding Walker guilty of kidnapping, the jury

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[3] Jury instruction number 21 required the State to prove Walker committed sexual abuse:

> 1. On or about the 7th day of May, 2011, Jabari Walker performed a sex act with Lisa Nguyen [and]
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> 2. Jabari Walker performed the sex act by force or against the will of Lisa Nguyen.

[4] The State alleged Walker had a prior conviction in Ohio that also constituted sexually predatory offense under section 901A.1. In light of the court's conclusion that Walker's instant offense did not qualify as a sexually predatory offense, it did not determine if Walker's prior offense was a sexually predatory offense. The State requests that if we conclude resentencing is necessary, we remand with an instruction for the district court to also "make the necessary determination as to Walker's prior offense as well."

found Walker confined or removed Nguyen without her consent *and* that he did so with the specific intent to subject her sexual abuse. Stated another way, the State claims that Walker's specific intent to subject Nguyen to sexual abuse, *plus* his affirmative act of intentional confinement or removal of Nguyen with that intent, is equivalent to an attempt to commit sexual abuse, thus qualifying the Walker's conviction as a sexually predatory offense.

Our supreme court was faced with a similar situation in *State v. Harrington*, 608 N.W.2d 440 (Iowa 2000). In that case, Harrington was charged with kidnapping in the third degree but convicted of the lesser-included offense of false imprisonment. *Id.* at 440. False imprisonment was not designated a sexually predatory offense by the statute. *Id.* at 441. The State presented evidence that Harrington had attempted to sexually abuse the victim, and the jury, in answer to a special interrogatory, found that Harrington had committed the crime of false imprisonment with the intent to commit sexual abuse. *Id.* at 440; *see also* Iowa Code § 901A.4(1) (1997). Harrington stipulated he had previously been convicted of a sexually predatory offense, and the district court found the offense subject to an enhanced sentence under section 901A.2(1). *Harrington*, 608 N.W.2d at 440.

On appeal, the supreme court vacated the enhanced sentence as illegal. *Id.* at 441. However, its inquiry did not end at that point, as the question raised in the appeal "concerning whether defendant's false-imprisonment conviction was a sexually predatory offense [was] not moot because courts are required to make prospective determinations of offenses that may so qualify under section

901A.4(2)."[5] *Id.* The court concluded Harrington's false-imprisonment conviction was a sexually predatory offense, falling "under [section 901A.1(1)(e)] of the definitional statute relating to '[a]ny offense involving an attempt to commit an offense contained in this section.'"[6] *Id.* With no analysis, the four-three decision opined that "[b]ased on the jury's answer to the interrogatory, the false-imprisonment offense involved an *attempt* to commit another offense contained in section 901A.1. That offense was sexual abuse, which is contained in [section 901A.1(1)(a)], which designates 'any provision of chapter 709.'" *Id.* (emphasis added).

We are faced with virtually identical circumstances. Although kidnapping is not specifically designated as a sexually predatory offense in section 901A.1(1), Walker's kidnapping conviction falls under section 901A.1(1)(e)—"[a]ny offense involving an attempt to commit an offense contained in this section"—as a sexually predatory offense. Necessarily incorporated into Walker's kidnapping conviction was the jury's finding Walker confined or removed Nguyen from one place to another, knowing he did not have Nguyen's consent, and "*did so with the specific intent to subject . . . Nguyen to sexual abuse*," for the jury, as instructed, had to make such findings in order to find

[5] We note section 901A.4(2) was repealed in 2000, but the section is not germane to this appeal.

[6] We recognize section 901A.1 was amended effective March 31, 2000, some nine days after the *Harrington* decision was filed. *See* 2000 Iowa Acts ch. 1030. However, the legislation was not in response to the *Harrington* decision; rather, it was in response to another case interpreting the enhancement provisions to operate prospectively only. *See Gully v. State*, 658 N.W.2d 114, 117-18 (Iowa Ct. App. 2002) (discussing *State v. Tornquist*, 600 N.W.2d 301 (Iowa 1999)); *see also State v. Russell*, No. 02-0946, 2003 WL 22187262, at *2 (Iowa Ct. App. Sept. 24, 2003) (same).

Walker guilty of kidnapping in the third degree.[7] (Emphasis added.) Following the *Harrington* holding, we conclude Walker's third-degree-kidnapping offense involved an attempt to commit another offense contained in section 901A.1.[8] That offense was sexual abuse, which is contained in subparagraph (a) of that section designating "any provision of chapter 709."

For the foregoing reasons, we affirm Walker's conviction, sustain the writ of certiorari, vacate Walker's sentence, and remand the case for resentencing. On remand, we direct the court to determine whether Walker's prior conviction in Ohio qualifies as a "prior conviction for a sexually predatory offense" and, if so, to sentence Walker to an enhanced sentence as provided in section 901A.2(3). *See* Iowa Code §§ 901A.1(1)(f); .2(3).

CONCIVTION AFFIRMED ON APPEAL; SENTENCE VACATED AND REMANDED ON CROSS-APPEAL.

Bower, J., concurs; Tabor, J., concurs specially.

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[7] The circumstances here would seem to make even a stronger case for the State than was presented in *Harrington*, as well as addressing the concerns outlined in the dissent in *Harrington*:

> The enhanced sentencing provisions of Iowa Code section 901A.2 plainly require *conviction* of an offense defined in section 901A.1 as sexually predatory before the enhancement applies. All we have here is a jury's interrogatory answer pertinent to a conviction nowhere included in section 901A.1. The crime of false imprisonment for which Harrington stands convicted may well have been sexually motivated, as the jury found. But the crime has not thereby been transformed into a sex abuse conviction under chapter 709, nor does it otherwise meet the statutory definition of sexually predatory offense.

Harrington, 608 N.W.2d at 442 (J. Neumann, dissenting). Here, intent to commit sexual abuse is an element of the crime of which Walker stands convicted.

[8] We are bound by our supreme court's pronouncements. *See State v. Hastings*, 466 N.W.2d 697, 700 (Iowa Ct. App. 1990) ("We are not at liberty to overturn Iowa Supreme Court precedent."); *State v. Hughes*, 457 N.W.2d 25, 28 (Iowa Ct. App. 1990) (citing *State v. Eichler*, 83 N.W.2d 576, 578 (Iowa 1957) ("If our previous holdings are to be overruled, we should ordinarily prefer to do it ourselves.")).

TABOR, J., (concurring specially)

I agree with the majority's conclusion that our supreme court's holding in *State v. Harrington*, 608 N.W.2d 440, 441 (Iowa 2000), dictates the result on the sentencing issue raised by the State. But if we were writing on a blank slate, I would find the sentencing enhancement for sexually predatory offenses as defined in Iowa Code section 901A.1(1)(e) (2011) should only apply when the jury finds the defendant has committed the act or acts necessary to establish an attempt to commit one of the offenses listed in sections 901A.1(1)(a)–(d). *See generally Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (holding any fact, other than a prior conviction, that increases the maximum penalty beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt).

Iowa case law defines an attempt as having the intent to do an act or bring about certain consequences that would amount to a crime coupled with an overt act in furtherance of that intent that goes beyond mere preparation.[9] *State v. Spies*, 672 N.W.2d 792, 797 (Iowa 2003). As the law now stands, every third-degree kidnapping premised on the intent to subject the victim to sexual abuse (under Iowa Code section 710.1(3)) automatically qualifies as an attempt to commit sexual abuse under chapter 709 and thus would subject the defendant to a twenty-five year prison term under section 901A.2(3) if the defendant had a prior conviction for a sexually predatory offense. Therefore any act of

[9] In *State v. Roby*, 188 N.W. 709, 714 (1922), the court defined the act needed for an attempt as one that would "reach far enough towards the accomplishment, toward the desired result, to amount to the commencement of the consummation, not merely preparatory. *It need not be the last proximate act to the consummation of the offense.*" (Emphasis added.)

confinement or removal—the overt acts in furtherance of the sexual abuse—are viewed as per se more than mere preparation, without any finding by the trier of fact.

Harrington does not offer any significant analysis of why the court believed all sexually motivated kidnappings would fit the definition of an attempt to commit sexual abuse. 608 N.W.2d at 441. On occasion, our supreme court will revisit an earlier decision when that decision lacks a sound analysis. *See Comes v. Microsoft Corp.*, 775 N.W.2d 302, 307 n.7 (Iowa 2009). I would respectfully suggest that it would be appropriate to revisit *Harrington* and require a jury to determine through a special interrogatory whether the offense committed by the defendant qualifies as an attempt to commit one of the sexual offenses listed in section 901A.1(1)(a)–(d).